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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930, No. 218

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, Twelfth District,
Appellant (below),

v.

DIME TRUST & SAFE DEPOSIT COMPANY, EXECUTOR of the Last Will and Testament of William B. Lewis, etc.,
Appellee (below).

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

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Supreme Court of the United States

October Term, 1930. No. 721.

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, Twelfth District,

Appellant (below),

v.

DIME TRUST & SAFE DEPOSIT COMPANY, EXECUTOR of the Last Will and Testament of William B. Lewis, etc.,

Appellee (below).

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The case has not been decided by the Circuit Court of Appeals. The opinion of the District Court (R. 17) is reported in 30 F. (2d) 395.

JURISDICTION.

The certificate of the Circuit Court of Appeals was filed in this Court on February 11, 1931 (R. 29). On April

13, 1931, the parties filed a joint motion for a writ of certiorari to bring up the entire record and cause. This brief is prepared upon the assumption that this motion will be granted.

Jurisdiction is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Does section 302 of the revenue act of 1924 require that the value of property held by husband and wife as tenants by the entirety, acquired prior to the effective date of the revenue act of 1916, be included in the gross estate of the tenant first dying for the purpose of the Federal estate tax?

2. Does section 302 of the revenue act of 1924 require that the value of property held by husband and wife as tenants by the entirety, acquired prior to the effective date of that Act but after the effective date of the revenue act of 1916, be included in the gross estate of the tenant first dying for the purpose of the Federal estate tax?

3. If the answer to either question be in the affirmative, had the Congress power to extend the cited taxing provision to such an estate so acquired?

STATUTES INVOLVED.

Section 302 of the Revenue Act of 1924, pp. 31 infra. Reference is made to similar provisions in all of the other Revenue Acts.

CONCISE STATEMENT OF CASE.

William B. Lewis married Anna Laura Lewis in 1886 (R. 16) and the marriage relation continued until his death, September 25, 1925 (R. 16). He died testate, a resident of Shamokin, Pennsylvania (R. 14-18). By his last will he appointed Dime Trust & Safe Deposit Company his executor (R. 14), and letters testamentary were granted to that Company which qualified and is acting as such (R. 14). The executor on August 5, 1926, filed with the Collector, the appellant, a Federal Estate Tax Return, (R. 15) including therein in Schedule D-1 "Jointly Owned Property Under Protest." (R. 15). The Commissioner and Collector of Internal Revenue of the United States exacted a tax of $18,915.12, from the Executor on the property held by entireties by the decedent and his surviving wife, which was paid under protest (R. 16). The property involved is enumerated in paragraph ninth of the plaintiff's statement of claim, (R. 3) which paragraph was incorporated by reference in the stipulations of fact (R. 3-15-19). There are 13 items of property, some of which were acquired prior to the effective date of the Revenue Act of 1916, some before the effective date of the Act of June 2, 1924, and the remaining items after the effective date of that Act. These items include real estate in Pennsylvania and in Florida, shares of the capital stock of a New Jersey corporation, mortgage bonds of a Pennsylvania corporation located at Shamokin, Pennsylvania, bonds and notes secured by mortgages on real estate, some of which were in Pennsylvania and some in Florida, unsecured promissory notes, household furniture, a saving account and checking account in bank in Pennsylvania.

The Government, in its brief, has adopted the following general classification which will be followed by us:

GROUP A.—PROPERTY HELD BY THE ENTIRETIES CREATED AFTER THE PASSAGE OF THE REVENUE ACT OF JUNE 2, 1924.

(6) A bond secured by mortgage of real estate, transferred to the decedent and his wife on May 1, 1925.

GROUP B.—PROPERTY HELD IN TENANCIES BY THE ENTIRETY CREATED BETWEEN THE DATE OF PASSAGE OF THE REVENUE ACT OF SEPTEMBER 8, 1916, AND THE DATE OF PASSAGE OF THE REVENUE ACT OF JUNE 2, 1924.

(1) A tract of land in Pennsylvania, deeded to the decedent and wife on August 12, 1922.

(2) A tract of land in Pensylvania, deeded to the decedent and wife on November 5, 1919.

(3) A tract of land in Florida, deeded to the decedent and wife on December 26, 1923.

(4) Four thousand shares of the capital stock in a New Jersey corporation, the original certificates for which were issued to the decedent and wife on September 10, 1921.

(5) Bonds of a water company located in Shamokin, Pennsylvania, acquired September 6, 1924. The stipulation recites: "They were purchased out of funds of William B. Lewis or Anna Laura Lewis on deposit in Dime Trust & Safe Deposit Company."

(7) Bond, secured by mortgage of real estate in Pennsylvania, dated February 16, 1923.

(8) Note, secured by mortgage of real estate in Florida, dated January 11, 1924.

(9) Note, secured by mortgage of real estate in Florida, dated April 25, 1924.

(10) Unsecured promissory note, dated May 4, 1925. It appears that the note was given for a Loan made from funds accumulated in the savings bank which were accumulated prior to June 2, 1924. (R. 19).

(13) Household furniture, valued at $2,075.00. It appears that it "was purchased with funds of William B. Lewis and Anna Laura Lewis about 1920 from the Savings Account in Dime Trust & Safe Deposit Company." (R. 19).

GROUP C.—BANK ACCOUNTS WHICH WERE HELD BY THE ENTIRETIES AND OPENED IN 1910.

(11) Item No. 11, consisting of saving account No. 3322 in Dime Trust & Safe Deposit Company, standing in the name of William B. Lewis or Anna L. Lewis, at the time of Mr. Lewis's death, showed a balance of $47,962.80, and the accrued interest thereon was $812.33. This savings account was opened in 1910 in the names of William B. Lewis or Anna Laura Lewis." (R. 6-7, 19).

(12) This is a checking account in the same bank. The account was opened in 1910 and the balance at the time of the decedent's death was $1,566.66. (R. 19).

At the time and times of the vesting of the title to each, every and all of the several items of property of William B. Lewis and Anna Laura Lewis enumerated and set forth in paragraph ninth of plaintiff's statement of claim, William B. Lewis and Anna Laura Lewis were husband and wife and the title to all of the items of real and personal property stood in the names of William B. Lewis and Anna Laura Lewis from the date of the inception of the title of the various items of property until the date of his death. (R. 19). On September 10, 1926, the tax was paid and on

the same date, the plaintiff filed with the Collector a claim for refund of the taxes so assessed and collected with the Commissioner. (R. 20). The Commissioner subsequently rejected the claim for refund in its entirety (R. 20) whereupon this suit was instituted in the District Court for the Middle District of Pennsylvania to recover the sum of $18,915.12, with interest from September 10, 1926. (R. 2). The Court, on February 2, 1929, directed that judgment be entered for the full amount of plaintiff's claim (R. 24) which judgment was entered March 1, 1929. (R. 25). The Collector appealed to the Circuit Court of Appeals of the Third Circuit and that Court, instead of deciding the case, certified the questions above stated to this Court for decision.

SUMMARY OF ARGUMENT.

An estate by entireties in Pennsylvania is one that arises whenever an estate vests in two persons, who being, when it so vests, husband and wife. It may exist in personal as well as real property, in choses in action as well as choses in possession. It is not effected by the so-called Married Women's Acts, it is not subject to the debts of one of the spouses, it cannot be severed without the consent of both husband and wife, it cannot be taken in execution for the debts of one of the parties, it does not pass to a Trustee in Bankruptcy of one of the parties, it is not encumbered by a lien against one of the spouses. It is not subject to the inheritance tax laws of Pennsylvania. It vests immediately upon its inception and upon the death of one of the spouses the other takes no new estate by the right of survivorship.

Since the decision of this Court in Tyler v. United States, 281 U. S. 497; 74 L. Ed. 991, it is conceded that the Commissioner had the right to include, for the purpose of

taxation, property acquired by the entireties subsequent to the passage of the Act of June 2, 1924. Of the property taxed there is however but one item covered by the Tyler case (p. 4 supra).

All other items of property became vested in the decedent and his wife prior to June 2, 1924, and the bank accounts became vested prior to the Act of 1916. Insofar as the Act of 1924 attempts to tax property acquired prior to its effective date it is unreasonable, arbitrary and capricious and amounts to confiscation and offends against the Fifth Amendment of the Federal Constitution.

1. NATURE AND INCIDENTS OF AN ESTATE BY ENTIRETY.

A tenancy by entireties is an estate held by husband and wife together so long as both live, and after the death of either, by the survivor so long as the estate lasts. The essential characteristic of the estate is that each spouse is seized of the whole or entirety and not of a share, moiety or divisible part. There is but one estate, and, in contemplation of law it is held by but one person.

Gasner v. Pierce, 286 Pa. 529;
Bramberry's Estate, 156 Pa. 628;
Sloan's Estate, 254 Pa. 346;
Beihl v. Martin, 236 Pa. 519;
Meyer's Estate, 232 Pa. 95;
Hilt v. Hilt, 50 Pa. Sup. Ct. 455;
O'Malley v. O'Malley, 272 Pa. 528;
Hoover v. Potter, 42 Pa. Superior Ct. 21;
Blease v. Andersen, 241 Pa. 198;
McIntosh's Estate, 289 Pa. 509;
Leach's Estate, 282 Pa. 545;
Meyer's Estate, 232 Pa. 89;
Hunt v. Blackburn, 128 U. S. 464; 32 L. Ed. 488;
Stuckey v. Keefe's Executors, 26 Pa. 397.

Each tenant is seized of the whole estate from its inception, and upon his death of one, while the right of survivorship remains to the other, that other takes no new estate.

Beihl v. Martin, 236 Pa. 519;
Leach's Estate, 282 Pa. 545;

"The quality of the estate is determined at its inception. It arises not out of the unity of person alone, but out of unity of person at the time of the grant."

Allen v. Lyon, 216 Pa. 604 at 606;
Hetzel v. Lincoln, 216 Pa. 60;
O'Malley v. O'Malley, 272 Pa. 528 at 533.

A tenancy by entireties cannot be severed by either the act of the husband or the wife, nor can the property held by entireties be seized by the creditors of one of the tenants in satisfaction of a debt.

Stuckey v. Keefe, 26 Pa. 397;
Beihl v. Martin, 236 Pa. 519;
Gasner v. Pierce, 286 Pa. 529;
O'Malley v. O'Malley, 272 Pa. 528;
McCurdy v. Canning, 64 Pa. 39;
Fleek v. Zillhaver, 117 Pa. 213;
Meritt v. Whitlock, 200 Pa. 50;
Rhodes's Estate, 232 Pa. 489.

An estate by entirety may exist in personalty as well as real property, in choses in action as well as choses in possession.

Bramberry's Estate, 156 Pa. 628;
Parry's Estate, 188 Pa. 33;
Rhoades Estate, 277 Pa. 450;
Slaymaker's Estate v. The Bank of Gettysburg, 10 Pa. 373;
Glick v. Cochens, 252 Pa. 56;
Sloan's Estate, 254 Pa. 346.

Among the items of property are a piece of real estate located in Florida and two mortgages secured on Florida real estate. (Items 3-8-9, R. 4-6). In Florida an estate by entirety exists to the same extent as it does in Pennsylvania.

English v. English, 63 Southern, 822;
Ohio Buttery Co. v. Hargrave, 84 Southern, 276.

This Court recognizes the rules of property arising under tenancies by the entireties in Pennsylvania and the rights and incidents of the parties therein. See *Tyler v. United States*, 281 U. S. 497; 74 L. Ed. 991; *Warburton v. White*, 176 U. S. 484; 44 L. Ed. 555; *Ed. Heinz, Yellow Pine Trustees v. Martin*, 268 U. S. 458; 69 L. Ed. 1050; *Clarke v. Clarke*, 178 U. S. 186, 44 L. Ed. 1028.

(2) PROPERTY ACQUIRED BY THE ENTIRETIES AFTER THE PASSAGE OF THE REVENUE ACT OF JUNE 2, 1924.

Since the decision of this Court in **Tyler v. United States**, 281 U. S. 497; 74 L. Ed. 991, it must be conceded that the Commissioner had the right to include, for purposes of taxation, property "acquired by the entireties subsequent to the passage of the Act of June 2, 1924." The only item of this group however which it is conceded is entirely covered by the Tyler case is item 6, supra, pg. 4. The water company bonds (Item 5, supra 4) and the promissory note (Item 10, supra 5) were purchased out of funds held by the entireties conceded by the Government to have belonged to the tenants by the entirety, prior to the enactment of the Act of 1924. (Brief for Collector 14.)

In **Blick v. Cochens**, 252 Pa. 56, bonds were purchased from a similar account and it was held that the bonds having been purchased with funds which had been deposited in the account of husband and wife belonged to the survivor the same as the money would have belonged to him if it had not been drawn from the Bank.

Since the Government concedes that these two items were purchased from funds belonging to the decedent and his wife prior to the passage of the Act their proper classification should be in group B. as property acquired prior to the passage of the Act of 1924, but after the passage of the Act of 1916. The purchase of the bonds and the taking of the note was simply a change in the form of investment and these items were not acquired in the sense that it was new property. It was simply a substitution of one form of property for another.

In the *Tyler* case it appeared affirmatively that the property taxed belonged to the decedent as the sole owner up to the time when the tenancy by the entirety was created. In the case at Bar it does not so appear. In the *Tyler* case and the cases decided therewith it appears that in each case the estate was created after the passage of the applicable Act and this was the ground upon which that case was decided.

Coolidge v. Long, 282 U. S. , 75 L. Ed. 308.

(3) PROPERTY ACQUIRED PRIOR TO THE PASSAGE OF THE REVENUE ACT OF 1924 BUT AFTER THE PASSAGE OF THE REVENUE ACT OF 1916.

The Act of June 2, 1924, (Section 301), provides: "a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 303), is hereby imposed upon the transfer of the net estate, of every decedent dying after the enactment of this Act. . . ."

Section 302 provides for "the inclusion in the gross estate of the decedent of the value at the time of his death, of all property, real or personal,

> "(a)—to the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate

and the expenses of its administration and is subject to distribution as part of his estate."

"(e)—to the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, . . . in their joint names and payable to either or the survivor."

"(h)—Sub-divisions b-c-d-e-f and g of this section shall apply to transfers, trusts, estate, interests, rights, powers and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised or relinquished before or after the enactment of this Act."

Paragraph (h) of section 302 of the Act of 1924 attempts to apply the provisions of sub-division E of section 302 to property, the title to which was vested prior to the enactment of the Act, thereby making the Act retroactive insofar as the property acquired prior to the passage of the Act is concerned.

We have seen that an estate by entirety in Pennsylvania takes effect from its inception, that it cannot be affected by the actions of either spouse and that it is not subject to the debts of one of the parties.

The property in an estate by entireties belongs to the survivor and the personal representative of the spouse first dying has no right to the property nor is it subject to the payment of the charges against his estate and the expenses of its administration nor is it subject to distribution as part of his estate.

Sloan's Estate, 254 Pa. 346.

In Pennsylvania an estate by entirety is not subject to an estate or inheritance tax under the State laws.

Leach's Estate, 282 Pa. 545;
Act of May 16, 1929, P. L. 1795.

Paragraphs (a) and (e) of sec. 302 of the act must be read and construed together.

The property rights of the parties having become fixed at the inception of the estate by reason of the original instrument creating it, and that act having been fully consummated before the taxing statute was passed, there was no retreat open to decedent. He was not able to change it without the consent of his co-tenant.

At the time of the creation of these estates there was no law taxing an estate by the entirety upon the death of one of the spouses. The *Tyler* case is the first decision of this Court holding that an estate of that kind can be taxed under any act of Congress.

The decisions of the Board of Tax Appeals and of the Courts before which the question arose prior to that decision all held that an estate by entirety could not be taxed under any of the Acts of Congress.

Lucia E. Blount v. United States, 59 Ct. of Cl. 328;
Dyer et al., executors of the Est. of Chas. I. Hudson, 5 U. S. Bd. of Tax Appeals, R. 711;
James C. Murphy & Mercantile Trust & Safe Deposit Co., executors of John H. Windfelder, 5 U. S. Bd. of Tax Appeals, 952;
Harry A. Smith, et al., executors of Ed. Meinel, v. Commissioner of Internal Revenue, 6 U. S. Bd. of Tax. Appeals, 341;
United States v. Provident Trust Co., et al. 35 Fed. 2nd, 339, considered with the Tyler case;
Lynch v. Congdon, 1 Fed. 2nd, 133.

In the case at bar the record is silent as to whether or not the property originally belonged to one or both spouses. When this suit was tried there was no decision by this court or any other appellate court upon the subject. In the decisions of the Board of Tax Appeals and of those courts before whom the question arose, it was deemed immaterial

whether the property had been contributed by one or both spouses. The decisions were that no estate of this kind could be taxed no matter whether the estate originally belonged to one or both spouses. It was thought that when the decedent used his funds to create a tenancy by the entirety, he, for all practical purposes, made a gift as fully as if made outright. He no longer had control over the property; he could not recall any portion of it; he could not convey it or encumber it.

The estates referred to in Group B were fully created before the taking effect of the Act of June 2, 1924, under which the tax is here claimed.

In **Blodgett vs. Holden**, 275 U. S. 142, 72 L. E. 206, Mr. Justice Holmes says, in relation to the Revenue Act of 1924:

> "I think it tolerably plain that the act should be read as referring only to transactions taking place, after it was passed, when to disregard the rule 'would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways.'"

In Nicholas vs. Coolidge, 274 U. S. 531, 71 L. E. 1184, in relation to the Act of Congress here under consideration, this court says:

> "Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. *But, under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them.* Taxes are very real things and statutes imposing them are estimated by practical results."
>
> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to a confiscation and offend the 5th Amend-

ment. Brushaber v. Union P. R. Co., 240 U. S. 1, 24, 60 L. ed. 493, 504, L. R. A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Barclay & Co. v. Edwards, 267 U. S. 442, 450, 69 L. ed. 703, 706, 45 Sup. Ct. Rep. 348. See also Knowlton v. Moore, 178 U. S. 41, 77, 44 L. ed. 969, 984, 20 Sup. Ct. Rep. 747. And we must conclude that Sec. 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

In **Blodgett vs. Holden**, supra, this court says:

"In Nichols v. Coolidge this court pointed out that a statute purporting to lay a tax may be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the 5th Amendment. As to the gifts which Blodgett made during January, 1924, we think the challenged enactment is arbitrary and for that reason invalid. It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing."

In **Untermyer v. Anderson**, 276 U. S. 440, 72 L. E. 645, this court says:

"Two opinions were announced in Blodgett v. Holden. The one prepared by the present writer expressed the views of four of the eight justices who participated in the consideration of the cause. After quoting the pertinent provisions of the statute, etc., the opinion declared: 'So far as the Revenue Act of 1924 undertakes

to impose a tax because of the gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the 5th Amendment.'"

"In the light of arguments advanced by counsel in the present cause the matter has been considered by all members of the court and a majority of them are of opinion that the gift tax provisions of the Act of 1924 here challenged must be construed as applicable to gifts made during the entire calendar year 1924. And, further, that so far as applicable to bona fide gifts not made in anticipation of death and fully consummated prior to June 2, 1924, these provisions are arbitrary and invalid under the due process clause of the 5th Amendment."

In the **Untermyer** case the gift was made while the bill containing the questioned provisions was in the last stages of progress through Congress.

In the case at Bar the property vested in the tenants by entirety, in most instances years before the Act of 1924 went into effect.

In **Lewellyn v. Frick**, 268 U. S. 238, 69 L. E. 934, this court says:

"Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind. Panama R. Co. v. Johnson, 264 U. S. 375, 390, 68 L. E. 748, 754. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, *but the general principal 'that laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways.*"

Whether or not a particular measure is invalid solely because it is retroactive, this court has consistently placed its stamp of disapproval on retroactive construction of taxing statutes in cases where no other construction was open.

Shwab vs. Doyle, 258 U. S. 529, 66 L. E. 747;
Lewellyn vs. Frick, supra;
Levy vs. Wardell, 258 U. S. 542, 66 L. E. 758;
Knox vs. McElligott, 258 U. S. 546, 66 L. E. 760;
Union Trust Co. vs. Wardell, 258 U. S. 537, 66 L. E. 753.

In the case of **Levy vs. Wardell**, supra, it is said:

"At the time of the transfers, there was no law of the State of California imposing any transfer or inheritance tax, nor was there a law of the United States to that effect, and all of the transfers were intended to take effect in possession and enjoyment upon their date. The act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in violation of the Constitution of the United States, in that it would take the property of plaintiffs without due process of law, in violation of the 5th Amendment, and would not be, besides, a transfer tax or an indirect tax, but would be a direct tax thereon, in violation of article 1, section 9, subdivision 4 of the Constitution of the United States because not laid in proper relation to census or enumeration, as therein provided."

In **Knox v. McElligott**, 258 U. S. 546, 66 L. E. 760, it is held that:

"A joint tenancy created prior to the Act of September 8, 1916, was not comprehended by the provisions of that act imposing a tax upon the transfer of the net estate of every decedent dying after the passage of that act."

In **Shwab vs. Doyle**, supra, this court quotes with approval from Story's Constitution, sec. 1398, "Retroactive laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation or with the fundamental principles of the social compact."

In **Coolidge vs. Long**, U. S. , 75 L. E. 308, decided by this court, February 24, 1931, Mr. Justice Butler, says:

> *"No act of Congress has been held by this court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment."* (Italics ours).
>
> *"This court has not sustained any state law imposing an excise upon mere entry into possession and enjoyment of property, where the right to such possession and enjoyment upon the happening of a specified event had fully vested before the enactment."* (Italics ours).
>
> "This court has held that the Revenue Act of 1924, 43 Stat. at L. 253, chap. 234, sec. 319-324, in so far as it undertook to impose a tax on gifts fully consummated before its provisions came before Congress (Blodgett v. Holden, 275 U. S. 142, 72 L. ed. 206, 48 S. Ct. 105) or before its passage (Untermeyer v. Anderson, 276 U. S. 440, 72 L. ed. 645, 48 S. Ct. 353), was arbitrary and repugnant to the due process clause of the 5th Amendment. In Nichols v. Coolidge, 274 U. S. 531, 71 L. ed. 1184, 52 A. L. R. 1081, 47 S. Ct. 710, we considered the trust deed of Mrs. Coolidge that is now before us. The question in that case was whether the value of the property so conveyed prior to the enactment should be included in her estate for the purpose of ascertaining the federal estate tax thereon. We said (p. 542):
>
> 'This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the 5th Amendment.

Brushaber v. Union P. R. Co., 240 U. S. 1, 24, 60 L. ed. 493, 504, L. R. A. 1917D, 414, 36 S. Ct. 236, Ann. Cas. 1917B, 713; Barclay & Co. v. Edwards, 267 U. S. 442, 450, 69 L. ed. 703, 45 S. Ct. 348. See also Knowlton v. Moore, 178 U. S. 41, 77, 44 L. ed. 969, 20 S. Ct. 747. And we must conclude that sec. 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of the property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary capricious and amounts to confiscation'."

"By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. It was a grant in praesenti to be possessed and enjoyed by the sons upon the death of such survivor. Blanchard v. Blanchard, 1 Allen, 223; Clarke v. Fay, 205 Mass. 228, 27 L. R. A. (N. S.) 454, 91 N. E. 328; McArthur v. Scott, 113 U. S. 340, 379, 28 L. ed. 1015, 1027, 5 S. Ct. 652, and cases cited. And see United States v. Fidelity Trust Co., 222 U. S. 158, 56 L. ed. 137, 32 S. Ct. 59; Henry v. United States, 251 U. S. 393, 64 L. ed. 322, 40 S. Ct. 185. The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. Coolidge v. Loring (235 Mass. 223, 126 N. E. 276). Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs.

Coolidge nor of her husband was a generating source of any right in the remaindermen. Knowlton v. Moore 178 U. S. 41, 56, 44 L. ed. 969, 975, 20 S. Ct. 747. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors."

Milliken v. United States, 282 U. S. , 75 L. Ed. 435, was decided upon the ground that the gift was made in contemplation of death and this court says that, "That is controlling here since it is not challenged by any facts appearing of record".

In **Sturges v. Carter**, 114 U. S. 511, 29 L. Ed. 240, at 243, the Supreme Court says, quoting from Society v. Wheeler, 2 Gall. 139:

"Mr. Justice Story thus defines a retroactive, or, as he calls it, a retrospective law: 'Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective'."

French v. Deen, 24 L. R. A. 387 at 391;
Hamilton v. Roush Bros., 19 L. R. A. 584 at 586.

In **Re Pell**, 171 N. Y. 48, 63 N. E. 789, 57 L. R. A. 540 at 542, it is said:

"The appellant insists that this amendment imposing a succession or transfer tax upon estates which vested

April 14, 1863, is retroactive, and attempts to tax estates and rights which had vested long before its enactment; that, this being so, it violates the Constitution of the United States, which forbids any law impairing the obligations of contracts, and also the Constitution of the state of New York, which prohibits the taking of private property for public use without compensation. The appellant does not attack the constitutionality of the law simply because it is retroactive, but for the reason that it is both retroactive and effective to impair vested rights."

"The language of this amendment of 1899 would seem to include all remainders created by deed or will which come within the restrictive time limitation therein fixed. Legislation which impairs the value of a vested estate is unconstitutional."

At 543:

"This Court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It therefore follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the transfer tax act, there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to di-

minish the value of these vested estates, to impair the obligation of a contract, and take private property for public use without compensation."

"Impair means to make worse, to diminish in quantity, value, excellence, or strength, to lessen in power, to weaken, to enfeeble, to deteriorate." Brearly School v. Ward, 40 L. R. A. (N. S.) 1215, at 1220.

"No law which divests property out of one person and vests it in another for his own private purposes without the consent of the owner, has never been held, a constitutional exercise of legislative power in any state of the Union. Cooley Const. Lim. 165; Wilkinson v. Leland, 27 U. S. 2 Pet. 658, 1 L. ed. 553; Satterlee v. Matthewson, 27 U. S. 2 Pet. 380, 1 L. ed. 458; Hoke v. Henderson, 15 N. S. 4, 25 Am. Dec. 677; Wales v. Stetson, 2 Mass. 143, 3 Am. Dec. 39; Calder v. Bull, 3 U. S. 3 Dall. 394, 1 L. ed. 561; Dash v. Van Keek, 7 Johns, 507, 5 Am. Dec. 291; U. S. Const. art. 1, 10; N. C. Const, art. 1, 17, Butler v. Pennsylvania, 51 U. S. 10 How. 416, 13 L. ed. 478; Fletcher v. Peck, 10 U. S. 6 Cranch, 137, 3 L. ed., 178; Stanmire v. Taylor, 48 N. C. 207, 214; King v. Hunter, 65 N. C. 603; 6 Am. Rept. 754, Wesson v. Johnson, 66 N. C. 189, 1 Kent, Com. 455; Stanmire v. Powell, 35 N. C. 312."

"Even in England, where there are no written constitutions, a statute will not commonly be construed to divest vested rights, and, when giving it a retrospective effect may lead to that result, it is allowed to operate prospectively only. Moore v. Phillips, 7 Mass. & W. 536; Couch v. Jeffries, 4 Burr, 2462." Lowe v. Harris, 22 L. R. A. 379 at 381.

In **National Bank of Commerce v. Jones**, 12 L. R. A. N. S. 310 at 314, it is said:

"An Act of the legislature which seeks to impair the

obligation of a contract, or to impair or destroy vested property rights, is unconstitutional and void. Toledo D. & R. R. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546; Crother v. Fidelity Ins. Trust & S. D. Co., 29 C. C. A. 1, 42 U. S. App., 701, 85 Fed. 43; Yeatman v. King, 2 N. D. 428, 33 Am. St. Rep. 797, 51 N. W. 721, Kilpatrick v. Kansas City & B. R. Co., 41 Am. St. Rep. 758, note; Giles v. Stanton, 86 Tex. 620, 26 S. W. 615; 1 Jones, Liens, 701. These authorities lay down the doctrine that a mortgage lien constitutes a vested property right, and, after it has attached, the legislature has no power to create a lien superior to the vested interest, or to provide that such vested lien shall be made inferior to a lien subsequently created; and we think this rule sound, and in harmony with reason and justice."

In Crump v. Guyer, 2 A. L. R. 331, the Court says:

"A vested right is the power to do certain actions or possess certain things lawfully, and is substantially a property right, and may be created either by common law, by statute, or by contract. And when it has been once treated, and has become absolute it is protected from the invasion of the legislature by those provisions in the Constitution which apply to such rights. And a failure to exercise a vested right before the passage of a subsequent statute which seeks to divest it, in no way affects or lessens that right."

In 6 R. C. L. pg. 304, it is said:

"This constitutional provision covers laws which create a right where none before existed and which relate back so as to confer on a party the benefit of

such right, and covers also all such laws as take away or impair any vested right acquired under existing laws, or create a new obligation, or impose a new duty, or attach a new disability in respect to transactions or considerations already past."

At 305:

"If a retrospective act which is neither an ex post facto law nor one impairing the obligation of a contract should nevertheless operate so as to take away a right of property, it may still be unconstitutional and void, not because it is retrospective, but by reason of its repugnancy to constitutional provisions guaranteeing due process of law."

At 306:

"It frequently occurs in the consideration of questions of constitutional law that the validity of a single statute may depend on the application of numerous principles and the weighing of conflicting interests and rights. This is well illustrated in the case of vested rights. A law may be unconstitutional through its retrospective operation, whereby it impairs vested rights."

At 307:

"Legislation which impairs vested rights may likewise be invalid as amounting to a taking of property without due process of law."

"Nevertheless statutes retrospective in their character and operation, directly affecting and divesting vested rights, are very generally considered as founded on unconstitutional principles, and consequently inoperative and void."

"Irrespective of any express prohibition as to the enactment of retrospective laws and, in consequence laws which retroactively divest vested rights, the broad proposition has been laid down that the legislature cannot impair or destroy vested property rights and that even if a law is intended simply to change the remedy or procedure it is void if in fact it impairs vested rights."

At 310:

"While there is in the federal constitution no express guaranty as to vested rights, such rights are nevertheless fully protected by the provisions that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation."

The cases heretofore relied on principally by the Government to sustain a tax of the kind here in question have been Chase National Bank v. United States, 278 U. S. 327, 73 L. E. 405, Reinecke v. Northern Trust Co., 278 U. S. 339, 73 L. Ed. 410, Saltonstall v. Saltonstall, 276 U. S. 260, 72 L. Ed. 259. The Chase National Bank and Northern Trust Company cases are not controlling. In the Chase National Bank case the decedent took out policies of insurance on his life after the effective date of the Revenue Act of 1921, and died while the Act was still in effect. In the suit to recover the tax resulting from including the proceeds of such policies in decedent's estate, it was claimed, and conceded by this Court, "that the interest of the beneficiaries in the insurance policies effected by decedent 'vested' in them before his death."

The Court said:

"But until the moment of death the decedent retained a legal interest in the policies which gave him the

power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them."

"A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefits of his creditors, *Cohen v. Samuels*, 245 U. S. 50; 38 S. Ct. 36; 62 L. ed. 143 (See Burlingham v. Crouse, 228 U. S. 459, 33 S. Ct. 564; 57 L. Ed. 920; 46 L. R. A. (N. S.) 148), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts, Domestic Relations Law, N. Y. (chapter 14, Consol. Laws), 52; *Kittel v. Domeyer*, 175 N. Y. 265, 67 N. E. 433; *Guardian Trust Co. v. Straus*, 139 App. Div. 884; 123 N. Y. S. 852, affirmed 201 N. Y. 546; 95 N. E. 1129, is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death."

After referring to *Saltonstall v. Saltonstall*, 276 U. S. 260, to the effect that the freeing of a remainder interest from the possibility of the exercise of a power of disposition was the appropriate subject of a succession tax, the opinion in the *Chase* case proceeds as follows:

"We think that the rule applied in *Saltonstall v. Saltonstall*, supra, to a succession tax is equally applicable to a transfer tax where, as here, the power of *disposition is reserved exclusively to the transferor* for his own benefit. Such an outstanding power *residing exclusively in a donor to recall a gift after it is made*

is a limitation on the gift *which makes it incomplete as to the donor* as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers." (Italics ours.)

In the *Northern Trust* case, the instruments creating two trusts which it was held should be included in the gross estate, reserved to the settlor alone the power of revocation, upon the exercise of which the trustee was required to return the trust corpus to him. It was argued that because these trusts were created in 1903 and 1910, the taxing statute if applied to them would be unconstitutional and void, because retroactive. The court rejected this contention saying:

> "*a transfer made subject to a power of revocation in the transferor,* terminable at his death, is not complete until his death. Hence section 402, as applied to the present transfers, is not retroactive since his death follows the passage of the statute." (Italics ours.)

The situation is different in tenancies by the entirety and joint tenancies, for, as pointed out above, the gift creates property rights which are beyond recall. This is recognized in *Knox v. McElligott,* 258 U. S. 546, where a joint estate was created in 1912 and upon the death of one of the decedents in 1917, one-half of the jointly owned property was returned as estate of the decedent. The Commissioner added the other half to the value of the estate and asserted a tax thereon. The Supreme Court, in holding that the Commissioner erred, quoted from the decision of the District Court as follows:

> "At the time the statute was passed Cornelia Kissam's interest belonged to her. . . . From the structure

of the Act to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer either title or control."

To the same effect are decisions of the New York courts interpreting the State Transfer Tax Act which, like the Federal Estate Tax Act, imposes a tax on transfers and provides that in the case of property held jointly or in Entirety, "upon the death of one of such persons the right of the surviving tenant . . . shall be deemed a taxable transfer." The courts of New York have consistently held that the statute was unconstitutional and violated the Fourteenth Amendment in so far as it attempted to tax such tenancies created prior to the passage of the act. See *In Re Lyons Estate*, 233 N. Y. 208; 135 N. E. 247; *In Re McKelways Estate*, 221 N. Y. 15, 116 N. Y. 348; *In Re Carnegies Estate*, 203 App. Div. 91; 196 N. Y. Supp. 502.

In the **Tyler** case this Court says that the evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part by an estate tax by this method of disposition during the lifetime of the spouse who owned the property. We have pointed out above that there was no Act of Congress retroactively affecting the estates by entirety in this case. We have shown that the decisions of the Board of Tax Appeals and of the Courts, except the Tyler case in the Circuit Court of Appeals for the Third Circuit, 33 Fed. 2nd, 724, had all decided the tax could not be imposed. Obviously, one cannot be charged with attempting to avoid a tax which was not in existence when he created the estate.

It is also interesting to consider the five trusts in *Northern Trust Company* that the Court refused to include in the gross estate of the decedent. In these

cases the grantor of the trust reserved no power to change the trust except with the acquiescence of the beneficiary whose interest the Court says was adverse and "the shifting of the economic interest of the trust property which was the subject of the tax was thus complete as soon as the trust was made." The court in disposing of this feature of the case stated that sections 401 and 402, when read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death where he has retained no control, possession, or enjoyment, and that the provision in section 402 (c) which includes transfers to take effect in possession or enjoyment at or after his death includes only those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under section 401. It was the ability of the decedent to place himself in *status quo* which caused the court to include the first two trusts, and the fact that all effective control had been lost in the case of the other five trusts which necessitated their exclusion. And so with entireties. All control was lost by the original instruments.

When the estates by entireties in the case at Bar were created the decedent then and there made a gift of such portion of the property contributed by him. He could not withdraw it by his own act as in the *Chase National* and *Northern Security Company*, cases. His inability to recall the transaction makes it, as to him, as complete a gift as if it had been out right.

GROUP C—PROPERTY ACQUIRED PRIOR TO THE PASSAGE OF THE ACT OF 1916.

This group involves the saving and checking accounts in Bank. These were opened in 1910 and in that sense acquired at that time.

The case of **Lucia E. Blunt v. United States**, 59 Ct. of Cls. 328 at 347, holds that the Act of 1916 is not retroactive. In that case the property was acquired prior to passage of the Act of 1916. The case was appealed by the Government to this Court and afterwards on its motion the appeal was dismissed.

Knox v. McElligott, supra, holds that a joint tenancy created prior to the Act of September 18, 1916, was not comprehended by the provisions of that Act imposing a tax upon the transfer of the net estate of every decedent dying after the passage of that Act.

In **Nichols v. Coolidge**, the Revenue Act of 1919 was under consideration and it was there held that that act was not retroactive.

The Acts of 1916, 1918 and 1921, were repealed without any saving clauses. The repeals were absolute. The general rule is that where a statute is repealed without a re-enactment of the repealed law in substantially the same terms and there is no saving clause or a general statute remitting the effect of the repeal, the repealed statute in regard to its operative effect is considered as if it had never existed except as to matters and transactions passed and closed, 25 R. C. L. 932, and there can be no vested right in any law which precludes its change or repeal. Id. 910.

Where an Act expires or is repealed, it is, as its operative effect considered, in the absence of a provision to the contrary, as if it had never existed, except as to matters and transactions, passed and closed. As to all future matters, or steps yet to be taken, the repealed statute upon which they are passed is treated as utterly obliterated. Endlich on Statutes, Section 478.

Yeaton v. U. S., 5 Cranch, 281;
Hamilton Bank v. Dudley, 2 Peters, 492.

"The repeal of a statute in the absence of a saving clause, necessarily divests and destroys all inchoate interests which have arisen under it."

Amer. and Eng. Enc. 747.

The appellant argues in his brief that notwithstanding the repeal of the prior Acts, the provisions of the Act of 1924 in respect of tenancies by the entirety should be construed as a continuation with certain modifications of the Revenue Acts of 1916, 1918 and 1921, and that Congress never intended to impair the liability for taxes created by those Acts which, though repealed, were instantly re-enacted and continued in force without interruption.

The answer to this proposition is

(a) The Government acquired no vested rights whatever in the Acts of 1916, 1918 and 1921.

(b) These Acts were repealed absolutely and the provisions thereof stricken from the Statutes. The provisions of those Acts could not be invoked except as to transactions passed and closed at the dates of their repeal.

(c) None of the prior Acts, as above shown, were retroactive.

The Act of 1924 is the first Act which attempts to legislatate retroactively. Insofar as it attempts to do this it is unconstitutional and void in that it is capricious and confiscates the property of the surviving spouse.

Respectfully submitted,

CHARLES C. LARK,
Attorney for Appellee.

Shamokin, Pa.,
April, 1931.

APPENDIX.

The Act of 1924, Section 301 provides for the levying of

"A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 303), is hereby imposed upon the transfer of the net estate, of every decedent dying after the enactment of this Act, whether a resident or non-resident of the United States; (here follow the percentages.)"

(b) "The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy or succession taxes actually paid to any state or territory or the District of Columbia in respect of any property included in the gross estate. The credit allowed by this sub-division shall not exceed 25 per centum of the tax imposed by this Section."

Section 302 provides:—

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated,—"

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate; . . .

(e) . . . To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, . . . in their joint names and payable to either or the survivor, except such part thereof as

may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth; PROVIDED, that where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or moneys' worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person; . . .

(h) Sub-divisions (b), (c), (d), (e), (f) and (g) of this Section shall apply to the transfers, trusts, estates, interests, rights, powers and relinquishment of powers as severally enumerated and described therein, whether made, created, arising, existing, exercised or relinquished before or after the enactment of this Act."

The Act of November 23, 1921, U. S. Compiled Statutes, 1916-1923, Supplement, Volume 2, page 2062, Section D, provides for

"a tax on the net estate of a decedent to the extent of the interest therein held jointly or as tenants in the entirety," etc.

From here on the language is the same as the Act of 1924, down to the last proviso which reads as follows:—

"Provided, further, that where any property has been acquired by gift, bequests, devise or inheritance or as a tenancy in the entirety by the decedent and spouse or where so acquired by the decedent or any other person as joint tenants their interests are not

otherwise specified or fixed by law, then to the extent of one-half thereof."

For the purposes of this case, the difference in the language of the Act of 1924 and 1921 is unimportant.

The Act of February 24, 1919, U. S. Compiled Statutes, 1916, Volume 1, page 1370, Section 402 in relation to estates by entireties reads as follows:

"D—To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other interests in their joint names, payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person never to have belonged to the decedent."

The Act of September 8, 1916, Section 202, 6 U. S. Compiled Statutes, page 7365 is in exactly the same language as the Act of February 24, 1919, Section 202.